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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 OLGA ORTMANN, as an individual
16 and on behalf of all others similarly
situated,

17 Plaintiff,

18 v.

19 NEW YORK LIFE INSURANCE
20 COMPANY, a corporation; NEW
YORK LIFE INSURANCE AND
21 ANNUITY CORPORATION, a
corporation; and DOES 1 through 20,
22 inclusive,

23 Defendants.

Case No. 3:07-CV-02506-WHA

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION TO
STAY OR TRANSFER THIS
ACTION, OR, IN THE
ALTERNATIVE, TO DISMISS
PLAINTIFF'S FIRST, SECOND,
FOURTH AND SIXTH THROUGH
TWELFTH CAUSES OF ACTION
PURSUANT TO "THE FIRST-TO-
FILE" RULE**

Judge: Hon. William Alsup
Date: July 5, 2007
Time: 8:00 a.m.
Courtroom: 9, 19th Floor

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1 **I. INTRODUCTION**

2 A civil action against Defendants New York Life Insurance Company and
3 New York Life Insurance and Annuity Corporation (“Defendants”) entitled
4 *Opyrchal v. New York Life Insurance Company, Inc., et al.* Case No. CV 07-518-
5 VBF (VBKx) is currently pending in the U.S. District Court for the Central District
6 of California before the Honorable Valerie Baker Fairbank (“*Opyrchal* Action”).
7 The *Opyrchal* Action was filed on December 11, 2006. More than three months
8 later, on March 26, 2007, Plaintiff Olga Ortmann filed the instant action against
9 Defendants (“*Ortmann* Action”).

10 The plaintiffs in both the *Opyrchal* Action and the *Ortmann* Action claim to
11 have been employed by Defendants as insurance agents in California. They both
12 seek to bring their claims on behalf of a proposed class of Defendants’ current and
13 former insurance agents in California within the four years preceding the filing of
14 their complaints. Both *Opyrchal* and *Ortmann* purport to allege nearly identical
15 class claims under the Labor Code for (1) failure to pay minimum wages, (2) failure
16 to reimburse for business expenses; (3) unlawful deductions from wages; (4) failure
17 to provide itemized wage statements; and (5) failure to pay all wages owed at the
18 time of termination; and for violation of Business & Professions Code sections
19 17200 *et al.* (“UCL”). In addition, *Ortmann* alleges several duplicative common
20 law claims for declaratory relief, unjust enrichment, conversion, and for an
21 accounting, all of which arise out of her claims concerning the alleged violations of
22 the Labor Code.¹

23 The only claims alleged by *Ortmann* that are unique to the *Ortmann* Action is
24 a claim for failure to pay overtime and a claim for failure to pay compensation for
25 denied meal and rest breaks. These claims, however, like *Ortmann*’s claim for
26

27 ¹ As is discussed fully in Defendants’ Motion to Dismiss, filed concurrently herewith, *Ortmann*’s
28 common law claims are not viable as a matter of law.

1 “failure to pay minimum wages” are premised upon Ortmann’s theory that she and
 2 the class members were misclassified as exempt employees. Of course, Opyrchal’s
 3 minimum wage claim is also premised on this same misclassification theory.

4 The well established “first-to-file” rule allows a district court to dismiss, stay
 5 or transfer an action when a similar complaint has already been filed in another
 6 federal court. “It is universally recognized that a ‘litigant has no right to maintain a
 7 second action duplicative of another.’”² This principle applies where causes of
 8 action are duplicative, even if other parts of the case are not duplicative.³

9 Pursuant to the “first-to-file” rule, Defendants request that this Court stay or
 10 transfer this action to the Central District Court where the *Opyrchal* Action is
 11 pending. Alternatively, Defendants request that the Court dismiss the *Ortmann*
 12 Action’s duplicative first, second, fourth, and sixth through twelfth causes of action
 13 because they concern rights and remedies that are substantially similar, if not
 14 identical, to those asserted in the first-filed *Opyrchal* Action. The *Opyrchal* Action
 15 - now pending in the Central District - will fully protect the rights, if any, of the
 16 putative class members. Application of the first-to-file rule here will promote
 17 judicial efficiency, and avoid duplication, wasted resources, the risk of inconsistent
 18 decisions and unnecessary expense.

19 **II. FACTS IN SUPPORT OF THE MOTION**

20 **A. The First-Filed Opyrchal Action.**

21 On or about December 11, 2006, Opyrchal, a former insurance agent of
 22 Defendants, filed suit in the California Superior Court, County of Los Angeles
 23 entitled: *Justin Opyrchal v. New York Life Insurance Company, Inc.; New York Life*
 24

25 ² See *BP Chemicals Limited v. Yankuang Group Boyang Foreign Economic & Trad. Co.*, No.
 26 CV-04-02946 PA, 2004 U.S. Dist. LEXIS 28822 at *2 (C.D. Cal. 2004) (citing *Barapind v. Reno*,
 72 F. Supp. 2d 1132, 1145 (E.D. Cal. 1999)).

27 ³ See, e.g., *Weinstein v. MetLife Inc.*, 2006 WL 3201045 (N.D. Cal. 2006) (Third Cause of Action
 28 stayed on motion that addressed only that count under the first-to-file rule because it was
 duplicative of an earlier filed suit).

1 *and Health Insurance Company, Inc.; New York Life Insurance and Annuity*
 2 *Corporation, Inc.*, Case No. CV 07-518-VBF (VBKx). (See Declaration of Jill A.
 3 Porcaro Decl.” ¶2, Exhibit A). Defendants removed the case to the Central District
 4 on January 22, 2007. (See Porcaro Decl. ¶3, Exh. B). Defendant New York Life
 5 and Health Insurance Company, Inc. was subsequently dismissed. Opyrchal filed a
 6 First Amended Complaint on or about May 11, 2007. (See Porcaro Decl. ¶5, Exh.
 7 D). Opyrchal’s first through fifth causes of action allege that he was not paid
 8 minimum wages in violation of Labor Code § 1194 and the Wage Orders (First
 9 Cause of Action), was not reimbursed for business expenses in violation of Labor
 10 Code § 2802 (Second Cause of Action), was subjected to unlawful deductions from
 11 wages in violation of Labor Code §§ 221, 223, 451 and/or 2802 (Second and Fifth
 12 Causes of Action), was not provided with properly itemized wage statements in
 13 violation of Labor Code § 226 (Third Cause of Action), and was not timely paid his
 14 final wages in violation of Labor Code §§ 201 through 203 (Fourth Cause of
 15 Action). Opyrchal’s Sixth and Seventh Causes of Action contend these alleged
 16 violations of the Labor Code constitute “unlawful” and “unfair” business practices
 17 in violation of the UCL. (See Porcaro Decl. ¶ 5, Exh. D) (*Opyrchal Action Amend.*
 18 *Compl.* ¶¶ 29-31, 34-36, 39-40, 44-45, 48-49, 53 and 58).

19 Opyrchal seeks to bring a class action on behalf of:

20 [C]urrent and former employees of Defendants
 21 throughout the State of California, who have been
 22 employed by Defendants in the State of California within
 23 the four (4) years preceding the filing of this Complaint –
 24 and continuing to trial or until an appropriate ending date
 25 for a Class Period – as Agents for Defendants (and/or in
 26 similar positions and/or with similar job titles, duties and
 27 responsibilities) working under a ‘TSA [sic] Plan
 28

1 Agreement [Training Allowance Subsidy Plan
2 Agreement]' which defines them as employees of
3 Defendants.

4 (*Opyrchal* Action, Amend. Compl. ¶ 7).

5 In connection with his claims, Opyrchal seeks to recover on behalf of himself
6 and the putative class members he purports to represent, (1) "restitution of all
7 monies, wages, expenses and benefits" allegedly due, (2) liquidated damages under
8 Labor Code § 1194.2, (3) interest, (4) nominal, actual, and compensatory damages,
9 (5) waiting time penalties under Labor Code § 203, (6) penalties under Labor Code
10 § 226, (7) equitable and declaratory relief, (8) attorney's fees, and (9) costs of suit.
11 (*See Opyrchal* Action, Amend. Compl., Prayer ¶¶ 1-14).

12 **B. The Overlapping, Second-Filed Ortmann Action.**

13 On March 26, 2007, more than three months after the *Opyrchal* Action was
14 filed, Ortmann filed her putative class action suit against the same Defendants in
15 the Superior Court of the State of California for the County of Alameda. (*See*
16 *Porcaro* Decl., ¶ 6, Exh. E). Defendants removed this action to this Court on May
17 10, 2007. (*See Porcaro* Decl. ¶ 6). Like Opyrchal, Ortmann alleges that
18 Defendants failed to pay their insurance agents minimum wages in violation of
19 Labor Code § 1194 (Second Cause of Action), failed to reimburse their agents for
20 business expenses in violation Labor Code § 2802 (Fourth Cause of Action); failed
21 to timely pay its former agents all wages due at termination in violation of Labor
22 Code § 203 (Sixth Cause of Action); and failed to provide them with accurate
23 itemized wage statements in violation of Labor Code § 226(a) (Seventh Cause of
24 Action) and violated the UCL (Twelfth Cause of Action). (*See Porcaro* Decl. ¶ 6,
25 Exh. E).⁴

26
27 ⁴ Ortmann's Complaint further alleges that Defendants failed to pay their agents overtime wages
28 (Third Cause of Action) and denied them meal and rest breaks required by California law (Fifth
Cause of Action).

1 In addition, Ortmann alleges related common law claims for declaratory
2 relief (First Cause of Action), an accounting (Eighth Cause of Action), unjust
3 enrichment (Ninth Cause of Action), conversion (Tenth Cause of Action), and
4 injunctive relief (Eleventh Cause of Action) arising out of the alleged violations of
5 the Labor Code that serve as the basis for her other causes of action.

6 Ortmann seeks to represent a class of “all persons who are or have been
7 employed by [Defendants] as insurance agents, in any of the Defendants’ offices in
8 the State of California during the Class Period.” (*Ortmann* Compl. ¶ 1.)

9 Plaintiff defines “insurance agent” as:

10 any individual whose primary assigned duties included or
11 included, but [sic] neither were nor are limited to,
12 insurance sales carried out pursuant to the “Training
13 Allowance Subsidiary Plan Agreement” and/or the
14 “Agent’s Contract”....

15 (*Ortmann* Compl. ¶ 15).

16 Ortmann further seeks to represent a subclass consisting of:

17 [A]ll persons whose employment with Defendants has
18 terminated and who did not receive all of the wages owed
19 to them at the time of termination, and/or who did not
20 receive their final wages in a timely matter as mandated
21 by California law. The named Plaintiff is a member of
22 this sub-class.

23 (*Ortmann* Compl. ¶ 15).

24 Similar to the *Opyrchal* Action, Ortmann seeks to recover (1) wages and “all
25 monies owed” to the putative class members, (2) interest accrued to date, (3)
26 penalties under Labor Code § 226, (4) liquidated damages under Labor Code §
27 1194.2, (5) waiting time penalties under Labor Code § 203 for failure to timely pay
28 all wages due at termination, (6) injunctive relief, (7) declaratory relief, (8)

attorney's fees, (9) nominal damages, and (10) costs of suit. (See *Ortmann* Compl., Prayer ¶¶ 3-9, 11-12). Ortmann further seeks an accounting, punitive damages and penalties under Labor Code §§ 226.7 and 558 for alleged denial of meal and rest breaks provided under California law.⁵ (See *Ortmann* Amend. Compl., Prayer ¶¶ 6, 10, 13).

III. ARGUMENT

A. This Court Should Stay or Transfer the *Ortmann* Action Because The Claims are Duplicative and/or Overlapping of the Claims Asserted in the First-Filed *Opyrchal* Action – Alternatively the Court Should Dismiss the Duplicative First, Second, Fourth, and Sixth Through Twelfth Causes of Action In the *Ortmann* Action.

There is a strong federal policy to avoid duplicative and inefficient litigation.

The principles of comity allow a district court to decline jurisdiction over an action where a complaint involving the same parties and issues has already been filed in another district. “[W]hile no precise rule has evolved, the general principle is to avoid duplicative litigation,” and promote judicial efficiency.

Barapind v. Reno, 225 F.3d 1100, 1109 (9th Cir. 2000) (citations omitted). When cases involving the same parties and issues have been filed in two different districts, the second district court has discretion to dismiss, stay or transfer the second case in the interest of efficiency and judicial economy. See *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625, 628-629 (9th Cir. 1991); *Peak v. Green Tree Fin. Serv. Corp.*, 2000 U.S. Dist. LEXIS 9711, *4, 2000 WL973685, *2 (N.D. Cal. 2000) (citing *Alltrade*, 946 F.2d at 623).

⁵ Defendants concurrently move to strike Plaintiff's request for punitive damages. See Defendants' Motion to Strike filed concurrently herewith. The *Opyrchal* Court struck Opyrchal's request for punitive damages by Order filed on February 12, 2007. See Porcaro Decl. ¶ 4, Exh. C.

1 This rule has been dubbed the “first-to-file” rule, and is well established in
 2 the Ninth Circuit. “In the Ninth Circuit, the ‘first-to-file’ rule embodies the
 3 principles of federal comity.” *Peak* 2000 WL 973685 at *2 (citing *Pacesetter Sys.,*
 4 *Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). *See also e.g., Carey v.*
 5 *Hillsborough County Dept. of Corrections*, 2006 WL 758311, 2006 U.S. Dist.
 6 LEXIS 23515 (D.N.H. March 6, 2006) (second-filed complaint dismissed where the
 7 claims, parties and available relief did not significantly differ from the first-filed
 8 complaint pending in the same district); *Hahn v. Tarnow*, 2006 WL 2160934, 2006
 9 U.S. Dist. LEXIS 52383 (E.D. Mich. July 31, 2006) (same); *Howard v. Klynveld*
 10 *Peat Marwick*, 977 F. Supp. 654, 664 (S.D.N.Y. 1997) (same). District courts are
 11 accorded “a great deal of latitude and discretion” in determining whether a claim is
 12 duplicative, but generally a “suit is duplicative, and thus subject to dismissal, if the
 13 claims, parties and available relief do not significantly differ between the two
 14 actions.” *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1145 (E.D. Cal. 1999); *Serlin v.*
 15 *Arthur Andersen & Co.*, 3 F.3d 221, 224 (7th Cir. 1993).⁶

16 The “first-to-file” rule has been expressly applied in the class action context.
 17 *See, e.g., Peak*, 2000 WL 973685, 2000 U.S. Dist. LEXIS 9711 (N.D. Cal July 7,
 18 2000) (holding that even though the named plaintiffs were different in two class
 19 actions, the issues that were presented sufficiently duplicated one another to justify
 20 dismissing the second filed case).

21 Indeed, the Ninth Circuit Court of Appeals has expressly noted that “[t]he

22
 23 ⁶ *See also, Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)
 24 wherein the United States Supreme Court recognized that the general principle is to avoid
 25 duplicative litigation, and that a district court’s authority to dismiss or stay duplicative claims
 26 operates to conserve scarce judicial resources and promote efficient and comprehensive
 27 disposition of cases. *Id.* at 817. *Colorado River* is widely cited in cases, such as this, where a
 28 district court exercises its discretion to dismiss or stay a duplicative claim filed in the same or
 different judicial district. *See Nakash v. Marchano*, 882 F.2d 1411 (9th Cir. 1989); *Hahn v.*
Tarnow, 2006 U.S. Dist. LEXIS 52383 at *22-26; *WeWee v. United States*, 2002 U.S. Dist.
 LEXIS 2959, *5 (D. Ariz. Jan. 31, 2002); *VISX, Inc. v. Garabet*, 2000 WL 1929328, 2000 U.S.
 Dist. LEXIS 19063, *6 (N.D. Cal. Dec. 22, 2000) (applying the first-to-file rule).

1 first-to-file rule was developed to ‘serve [] the purpose of promoting efficiency
 2 well and should not be disregarded lightly.’” *Alltrade, Inc. v. Uniweld Prod., Inc.*,
 3 946 F.2d 622, 625 (9th Cir. 1991). In fact, “unless compelling circumstances
 4 justify departure from this rule,” the first-filed case “should be permitted to proceed
 5 without concern about a conflicting order being issued in the later filed action.”
 6 *Ward v. Follett Corp.*, 158 F.R.D 645, 648-650 (N.D. Cal. 1994) (district court
 7 dismissed action to allow first-filing party to proceed without concern of a
 8 conflicting order being issued by the court in the second-filed action). *See also*
 9 *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202-03 (2d. Cir. 1970)
 10 (reversing district court’s refusal to stay second-filed action pursuant to general rule
 11 that the first of two duplicative actions should take precedence).

12 Under the first-to-file rule, a district court may, in its discretion, dismiss, stay
 13 or transfer a later-filed case once three simple requirements, all present here, are
 14 met:

15 (1) Chronology (i.e., the case that will be dismissed, stayed or transferred
 16 must be the second case filed);

17 (2) Similarity of parties; and

18 (3) Similarity of issues.

19 *Alltrade, Inc.*, 946 F.2d at 625-626; *Guthy-Renker Fitness v Icon Health and*
 20 *Fitness, Inc.*, 179 F.R.D. 264, 270; *Ward v. Follett Corp.*, 58 F.R.D. 645, 648 (N.D.
 21 Cal. 1994). If these requirements are met, as is clearly the case here, the court may
 22 then apply equitable considerations to determine whether “wise judicial
 23 administration” warrants relief, or whether concurrent litigation should proceed. *Id.*
 24 at 627.

1 B. **The Three Factors Courts Consider In Applying The “First-to-**
 2 **File” Rule Favor a Stay, Transfer or Dismissal of the *Ortmann***
 3 **Action.**

4 As shown below, the three requirements of the first-to-file rule in *Alltrade*
 5 are satisfied, and the equitable considerations militate strongly in favor of staying or
 6 transferring the entire *Ortmann* Action to the Central District. The *Ortmann*
 7 Complaint alleges virtually the same or overlapping legal claims (relating to failure
 8 to pay wages, failure to reimburse business expenses, unlawful deductions from
 9 wages, failure to provide proper itemized wage statements, failure to timely pay all
 10 wages due at termination and unfair competition) on behalf of a purported class of
 11 Defendants’ current and former insurance agents that is essentially same as the
 12 class the plaintiff in *Opyrchal* purports to represent. Because the *Opyrchal* Action
 13 was filed before the *Ortmann* Action, the *Opyrchal* Action “should have priority.”
 14 *National Union Fire Ins. Co. of Pittsburgh, PA. v. Liberty Mutual Fire Ins. Co.*,
 15 No. 05 CIV 5262 (DLC), 2005 U.S. Dist. LEXIS 19778, *2 (S.D.N.Y. Sept. 7,
 16 2005) (“where there are two competing lawsuits, the first suit should have priority,
 17 absent the showing of balance of convenience or special circumstances”).

18 1. **The *Opyrchal* Action Was Chronologically Filed First.**

19 The *Opyrchal* Class Action was filed on December 11, 2006, prior to the
 20 *Ortmann* Action’s filing on March 26, 2007. Thus, the first element, chronology of
 21 the actions, is met. See *Wherry v. All California Funding*, No. C 06-4384 SBA,
 22 2006 U.S. Dist. LEXIS 53431, *5, fn.3 (N.D. Cal. July 20, 2006) (declining
 23 jurisdiction where the same property was at issue in a pending Bankruptcy Court
 24 action, and noting dismissal was also proper under the first-to-file rule because the
 25 Bankruptcy Court action was filed prior to the instant action and involved the same
 26 parties and issues).

2. **The Opyrchal Action Includes the Same Defendants and Putative Class Members as are Included in This Action.**

“The parties and issues need not be identical” for the first-to-file rule to apply. *See Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F. Supp. 2d 686, 688 (E.D. Tenn. 2005) (citing *Save Power Ltd. v. Syntek Finance Corp.*, 121 F.3d 947, 950-51 (5th Cir. 1997)). “Rather, the crucial inquiry is whether the parties and issues substantially overlap.” *Id.* at 688. *See also Peak*, 2000 WL 973685, at *2 (applying “first-to-file” rule where “[t]he proposed class in both cases is identically defined” and the alleged offending behavior “is the same in both cases”); *Dist. Council 37 Health & Sec. Plan v. McKesson*, 2006 U.S. Dist. LEXIS 30584, *2-3 (N.D. Cal. May 11, 2006) (under the first-to-file rule, the court found the parties substantially similar because although the named plaintiffs in the two cases were different, they were members of classes which were defined identically in the two actions).

Also, in applying the “first-to-file” rule to a class action, the fact that the class representatives are different and no class has yet been certified is irrelevant to the analysis. Instead, courts consider whether the putative classes are similar. *Id.* *See also e.g., Weinstein v. Metlife Inc., et al.*, 2006 WL 3201045 (N.D. Cal Nov. 6, 2006) (“In a class action, it is the class, not the representative, that is compared” in analyzing whether the parties are sufficiently similar”); *District Council 37 Health & Security Plan v. McKesson*, 2006 U.S. Dist. LEXIS 30584 *2-3 (N.D. Cal. May 11, 2006) (“The Court finds that the parties to the two cases are substantially similar”); *Curtis v. DiMaio*, 46 F. Supp. 2d 206, 215-16 (E.D.N.Y. 1999) (dismissing suit as duplicative after finding that although parties were not identical, their interests were sufficiently aligned).

Here, the Defendants in the *Ortmann* Action are identical to the Defendants named in the *Opyrchal* Action. In addition, Ortmann proposes to represent a class of Defendants’ current and former insurance agents in California, which are entirely

encompassed within the class that Opyrchal seeks to represent in the first-filed action. In fact, Plaintiff Ortmann herself is a putative member of the class that Opyrchal seeks to represent. Thus, the parties here “substantially overlap,” if not fully overlap for purposes of the first-to-file rule, and the rule’s second element is met. *See Centocor, Inc. v. MedImmune, Inc.*, 2002 WL 31465299 *3 2002 U.S. Dist. LEXIS 21109 (N.D. Cal. Oct. 22, 2002) (“Courts generally do not require identical issues or parties so long as the actions involve closely related questions or common subject matter.”). The parties need only “represent the same interests” to be duplicative. *Howard v. Klynveld Peat Marwick*, 977 F. Supp. 654, 664 (S.D.N.Y. 1997) (finding an action duplicative even though the later lawsuit named additional individual defendants).

3. **The Ortmann Action and the Opyrchal Action Challenge Defendants’ Compliance With the Same California Laws Applicable to Payment of Wages, Reimbursement of Business Expenses, Deductions from Wages and Wage Statements Requirements; Thus the Issues Are the Same or Overlapping.**

“The issues in the two actions need not be identical for purposes of the first-to-file rule but must only be substantially similar.” *See Walker*, 2003 U.S. Dist. LEXIS 7871 at *7. “Accordingly, slight differences in the claims asserted do not prevent application of the rule where the underlying complained-of conduct is almost identical.” *Id.* at *7-8.

Here, Ortmann seeks to bring multiple claims, duplicative of those asserted in the *Opyrchal* Action, based on Defendants’ purported failure to pay minimum wages for all hours worked under Labor Code § 1194, failure to reimburse employees for business expenses in violation of Labor Code § 2802, unlawful wage deductions, failure to timely pay employees their final wages at the time of termination in violation of Labor Code §§ 201-203, failure to provide wage statements that comply with the requirements of Labor Code § 226(a), and unfair competition in violation of the UCL. The substantial similarity of Ortmann’s

1 claims to those brought by Opyrchal is apparent from a comparison of their
2 allegations below:

3 **The Wage Claims:**

4 Opyrchal Action: In his First Cause of Action (for alleged “Failure to Pay
5 Minimum Wage, Under the Laws of the State of California”), Opyrchal alleges in
6 pertinent part that “Defendants have unlawfully denied Plaintiffs [sic] wages and
7 other benefits of employment, when as a matter of fact and law, Plaintiffs are
8 Defendants’ ‘employees’ pursuant to contract.” Opyrchal further alleges that
9 “Defendants have not paid Plaintiffs the minimum wage for all hours worked
10 during the period that they were in training for three (3) days per week.” (*See*
11 *Opyrchal* Amend. Compl. ¶¶ 29 and 31). Opyrchal premises his minimum wage
12 claim on his theory that Defendants misclassified their insurance agents as exempt
13 employees while in training. He alleges “[w]hile the Agents are engaged in
14 attending such orientation and training classes, Agents are not engaged in any
15 activities directly related to marketing or selling policies or products to Defendants’
16 customers” and that “Plaintiffs end up ...with payment less than the minimum
17 wage.” (*Opyrchal* Amend. Compl. ¶ 9).

18 *Opyrchal* seeks to recover “all amounts for all such hours worked, penalties
19 pursuant to Labor Code § 203, liquidated damages, interests, attorneys’ fees, costs
20 and expenses of suit, pursuant to Labor Code §§ 1194 and 1194.2, according to
21 proof at time of trial.” (*See Opyrchal* Amended Compl. ¶ 31).

22 Ortmann Action: In her Second Cause of Action (for alleged “Failure to Pay
23 Minimum Wages Under California Industrial Welfare Commission Orders and
24 *Labor Code* § 1194”), Ortmann similarly alleges that “Defendants failed to
25 compensate Plaintiff and the members of the Plaintiff Class for hours worked as
26 required under the *California Labor Code* and *Code of Regulations*.” Ortmann
27 further alleges that “Plaintiff and members of the Plaintiff Class are entitled to
28 minimum wages for hours worked during the four (4) four years preceding the

1 filing of this Complaint.” (*See Ortmann* Compl. ¶¶ 26-27) (emphasis in original).

2 Ortmann seeks to recover compensation on behalf of herself and the putative
3 class members for unpaid wages, “plus interest, penalties, attorney’s fees, expenses
4 and costs of suit.” (*See Ortmann* Compl. ¶ 30). In addition, Ortmann seeks an
5 award of “nominal, actual, compensatory and punitive damages. (*See Ortmann*
6 Compl. ¶ 29).

7 Ortmann further alleges additional wage and wage-related claims for unpaid
8 overtime (Third Cause of Action) and for compensation for denied meal and rest
9 breaks (Fifth Cause of Action). As with Opyrchal, Ortmann premises each of these
10 claims on the theory that Defendants misclassified their insurance agents as exempt
11 employees. She alleges: “Plaintiff and members of the Plaintiff class previously
12 were, or presently are, insurance agents employed as employees by Defendants in
13 California who were not, and are not, exempt from the payment of minimum wages
14 and overtime under California law.” (*Ortmann* Compl. ¶ 10.). In support of her
15 claim for denied meal and rest breaks, Ortmann further contends that Defendants
16 failed to comply with the California Wage Order and Labor Code § 226.7, which
17 provide for meal and rest breaks for non-exempt employees. (*Ortmann* Compl. ¶¶
18 46-47).⁷ Ortmann’s claims for overtime and denied meal and rest breaks overlap
19 with Opyrchal’s minimum wage claim because they rely on a misclassification
20 theory and therefore present the possibility of inconsistent rulings should they be
21 litigated in different courts.

22 **Failure to Reimburse/Unlawful Deduction Claims:**

23 Opyrchal Action: In his Second Cause of Action (for alleged “Failure to
24 Indemnify and Reimburse For Business Expenses, and Unlawful Deductions from
25 Wages”), Opyrchal alleges that “Plaintiffs have been required to, among other
26 items: pay monthly rent on a cubicle in Defendants’ offices; pay monthly telephone

27 ⁷ *See Ortmann* Compl. ¶¶ 26, 37, 44; California Wage Order 4-2001 (as amended), California
28 Code of Regulations, Title 8, § 11090, Sections 1, 11 and 12.

1 service charges for a phone line run into their cubicle; pay copy charge fees; and
 2 pay for required, specialized software and technical support for that software as a
 3 monthly charge” and that “Defendants have also charged Plaintiffs a ‘commission
 4 administration fee’ for each policy on which Defendants paid Plaintiffs a
 5 commission.” (*See Opyrchal* Amend. Compl. ¶ 35). Opyrchal further alleges that
 6 “Defendants have refused to perform their obligations to properly indemnify and
 7 reimburse Plaintiffs for such items, and avoid making deductions or setoffs from
 8 Plaintiffs’ earned wages.” (*See Opyrchal* Amend. Compl. ¶ 35).

9 Opyrchal seeks to recover on behalf of himself and the putative class
 10 members, “all amounts for all such expenses, penalties pursuant to Labor Code
 11 § 203, interest, attorneys’ fees, and court costs and expenses of suit, pursuant to
 12 Labor Code §§ 218.6 and 2802, according to proof at trial.” In addition, Opyrchal
 13 seeks “nominal, actual and compensatory damages in amounts according to proof at
 14 trial.” (*See Opyrchal* Amend. Compl. ¶ 36).

15 Ortmann Action: In her Fourth Cause of Action (for alleged “Failure to
 16 Indemnify for Expenses and Losses and Illegal Deductions from Wages Under
 17 *California Labor Code* §§ 226 and 2802), Ortmann similarly alleges in pertinent
 18 part that “Defendants acted wrongfully by: a. Failing to indemnify Plaintiff and
 19 members of the Plaintiff Class for office supplies, faxes, rent, software, sales
 20 scripts, call leads, insurance, mileage, and other expenses...”. Ortmann further
 21 alleges that Defendants made “unlawful deductions and/or set-offs from the wages
 22 of Plaintiff and members of the Plaintiff class, and failing to properly itemize all
 23 deductions from wages.” (*See Ortmann* Compl. ¶ 40).

24 Similar to Opyrchal, Ortmann seeks to recover on behalf of herself and the
 25 putative class “the unpaid balance of monies Defendants owe, plus interest,
 26 penalties, attorney’s fees, expenses and costs of suit.” (*See Ortmann* Compl. ¶ 44).

1 **Wage Statement Claims:**

2 Opyrchal Action: In his Third Cause of Action (for alleged “Failure to
3 Provide Properly Itemized Wage Statements, Under the Laws of the State of
4 California”), Opyrchal alleges in pertinent part that “Defendants have refused to
5 perform their obligations to provide Plaintiffs with properly itemized wage
6 statements, including proper itemization of employees’ pay, and of deductions
7 authorized in writing by employees.” (*See Opyrchal* Amend. Compl. ¶ 39).

8 Opyrchal seeks to recover on behalf of himself and the putative class
9 members “all amounts for all such wages and expenses and benefits on such wages
10 statements, penalties, interest, attorneys’ fees and court costs and expense of suit
11 pursuant to Labor Code §§ 218.6 and 226, according to proof at time of trial.” In
12 addition, Opyrchal seeks to recover “in addition to or in lieu of some or all such
13 wages and expenses and benefits, nominal, actual and compensatory damages in
14 amounts according to proof at time of trial.” (*See Opyrchal* Amend. Compl. ¶ 41).

15 Ortmann Action: In her Seventh Cause of Action (for alleged “Failure to
16 Provide an ‘Accurate’ Itemized Wage Statement Upon Payment of Wages in
17 Violation of Labor Code § 226”), Ortmann similarly alleges that “Defendants failed
18 to accurately record on their wage statements, the hours and overtime hours worked
19 by Plaintiff and the class. (*See Ortmann* Compl. ¶¶ 55-56). Ortmann further
20 alleges that “Plaintiff and members of the Plaintiff class were damaged by these
21 failures because, among other things, the failure to accurately record or maintain
22 records of the hours worked hindered Plaintiff and the members of the Plaintiff
23 Class from determining the amounts of wages owed to them.” (*See Ortmann*
24 Compl. ¶ 57).

25 Similar to Opyrchal, Ortmann seeks to recover on behalf of herself and the
26 putative class members, penalties under Labor Code section 226(e), “as well as
27 interest, attorney’s fees and costs ...”. (*See Ortmann* Compl. ¶ 58).

Waiting Time Penalty Claims:

Opyrchal Action: In his Fourth Cause of Action (for alleged “Wages Unlawfully Withheld at Termination”), Opyrchal alleges in pertinent part that “Defendants have refused to perform their obligations to provide former employee-Plaintiffs with all earned wages as of the date of each former-employee-Plaintiffs’ termination of employment with Defendants.” (*See Opyrchal Amend. Compl.* ¶ 45). Opyrchal seeks to recover on behalf of himself and the putative class members, “all amounts for all such compensation plus waiting time penalties pursuant to Labor Code sections 200-203, according to proof at trial.” In addition, Opyrchal seeks to recover “nominal, actual and compensatory damages in amounts according to proof at trial.” (*See Opyrchal Amend. Compl.* ¶ 45).

Ortmann Action: In her Sixth Cause of Action (for alleged “Failure to Pay Compensation at the Time of termination in Violation of Labor Code §§ 201-203”), Ortmann alleges that “Plaintiffs and the members of the terminated subclass were previously employed by Defendants” and that “Defendants failed to pay all wages due to this sub-class at the time of termination, and, in addition failed to pay all wages due in a timely manner as mandated by California Labor Code §§ 201-203.” (*See Ortmann Compl.* ¶51).

Similar to Opyrchal, Ortmann seeks to recover on behalf of herself and the putative class, “waiting time wage continuation for the allocable time period prior to filing this complaint, plus costs, interest, disbursements and attorneys fees pursuant to California law, including but not limited to Labor Code §§ 218.5 and 218.6.” (*See Ortmann Compl.* ¶ 52).

Unfair Competition Claims:

Opyrchal Action: In his Sixth Cause of Action (for alleged “Unfair Business Practices in Violation of Cal. Bus. & Prof. Code § 17200”) and his Seventh Cause of Action (for alleged “Unlawful Business Practices in Violation of Bus. & Prof. Code § 17200”), Opyrchal alleges that “[b]y violating the foregoing provisions of

1 California's labor and employment laws, and by failing to take immediate and
 2 appropriate measures to address these violations, Defendants' acts constitute unfair
 3 business practices under Business and Professions Code section 17200 *et seq.* (See
 4 *Opyrchal* Amend. Compl. ¶¶ 53 and 57). Opyrchal seeks to recover on behalf of
 5 himself and the putative class "restitution of all monies paid to Defendants to by the
 6 Plaintiffs pursuant to the illegal acts alleged herein...". (See *Opyrchal* Amend.
 7 Compl. ¶¶ 54 and 59).

8 Ortmann Action: In her Twelfth Cause of Action (for alleged Violation of
 9 Cal. Bus. & Prof. Code § 17200), Ortmann similarly alleges that "[b]y violating the
 10 statutes and regulations set forth hereinabove...failing to pay either minimum
 11 wages and/or overtime wages, unfairly deducting wages and charging for expenses
 12 and losses incurred by Plaintiff and members of the Plaintiff Class in discharge of
 13 their employment duties, and forcing Plaintiffs to purchase supplies and other items
 14 from Defendants in violation of *Labor Code* § 450, Defendants acts constitute
 15 unfair and unlawful business practices under *Business and Professions Code* §
 16 17200." (See *Ortmann* Compl. ¶ 83). Ortmann seeks to recover on behalf of herself
 17 and the putative class members, "restitution of all monies and profits to be
 18 disgorged from defendants and in amount according to proof at trial." (See *Ortmann*
 19 Compl. ¶ 85).⁸

20 **Ortmann's Duplicative Common Law Claims:**

21 Duplicative of her UCL claim and her statutory claims, Ortmann attempts to
 22 assert several common law claims arising out of Defendants' alleged violations of
 23 the Labor Code, including claims for declaratory relief (First Cause of Action),
 24 accounting (Eighth Cause of Action), unjust enrichment (Ninth Cause of Action),
 25 conversion (Tenth Cause of Action) and injunctive relief (Eleventh Cause of
 26

27 ⁸ As discussed in Defendants' Motion to Strike filed concurrently, Ortmann may not recover the
 28 disgorgement of profits under the UCL. The Court in *Opyrchal* struck the plaintiff's claim for
 disgorgement of profits under the UCL. See also Porcaro Decl. ¶4, Exh. C.

1 Action).²

2 The remedies of “declaratory relief” and “appropriate equitable relief” –
 3 which would encompass Ortmann’s equitable claims - are requested in the Prayer to
 4 the *Opyrchal* Action. (*Opyrchal* Amend. Compl., Prayer ¶¶ 12, 13).¹⁰

5 Further, Ortmann’s conversion and unjust enrichment claims are essentially
 6 re-pleading her for unpaid wages, failure to reimburse business expenses, and
 7 unlawful deductions. Specifically, in support of her conversion claim, Ortmann
 8 alleges “Defendants knowingly and intentionally required Plaintiff and members of
 9 the Plaintiff Class to work without pay and overtime pay” and that “[i]n refusing to
 10 pay wages and overtime owed to Plaintiff and members of the Plaintiff Class,
 11 Defendants knowingly, unlawfully, and intentionally took, appropriated, and
 12 converted the property of Plaintiff and members of the Plaintiff Class here alleged
 13 for Defendant’s own use.” (*See Ortmann* Compl. ¶¶ 70, 76). Ortmann further
 14 alleges that “Defendants knowingly and intentionally forced Plaintiff and the
 15 members of the Plaintiff Class to pay for expenses and losses incurred in the
 16 discharge of their employment and/or made illegal wage deductions and/or wage
 17 deductions from the pay of Plaintiff and the members of the Plaintiff Class. (*See*
 18 *Ortmann* Compl. ¶ 72). Although Ortmann further alleges that “Defendants
 19 knowingly and intentionally failed to allow and pay for meal and rest breaks” the
 20 inclusion of this additional allegation in her claim does not preclude application of
 21 the “first-to-file” rule.

22 Even if there isn’t an exact match between the above claims in the *Ortmann*
 23 Action and *Opyrchal* Action, it is well-established that the “identity of issues”
 24 contemplated by the *Alltrade* court does not require strict identity of issues, but

25 ² The Court in *Opyrchal* struck the plaintiff’s claim for injunctive relief based on lack of Article
 26 III standing. *See* Porcaro Decl. ¶4, Exh. C. Defendants have moved to dismiss Ortmann’s
 injunctive relief claim in this Action on identical grounds.

27 ¹⁰ As set forth Defendants’ Motion to Dismiss, these claims are barred by the exclusive remedy
 28 doctrine.

1 rather, only similarity of issues. *In Peak v. Green Tree Fin. Serv. Corp.*, The court
 2 stressed that:

3 The rule is not to be mechanically applied, but rather “it is
 4 to be applied with a view to the dictates of sound judicial
 5 administration,” and “should not be disregarded lightly.”

6 *Id.* at 2000 U.S. Dist. Lexis *4 9711 2000 WC 973685 at *2 (quoting *Pacesetter*,
 7 678 F.2d at 94-95); *see also Bryant v. Oxxford Express, Inc.*, 181 F. Supp. 2d 1045,
 8 1048 (C.D. Cal. 2000).

9 In *Bryant v. Oxxford Express, Inc.*, the court enjoined Oxxford’s prosecution
 10 in the District of New Jersey of an action against Bryant for indemnification. 181
 11 F. Supp. 2d at 1048. The indemnification claim arose out of Oxxford’s breach of
 12 an agreement with a third party arising from Bryant’s failure to uphold his
 13 contractual obligation with Oxxford. *Id.* An earlier filed declaratory relief claim
 14 sought to relieve Bryant of all responsibility under his contract with Oxxford.
 15 While these issues clearly were not identical, nevertheless, the court enjoined the
 16 later-filed action because they were similar. The court observed: “both actions
 17 involve the same issues concerning the parties’ respective rights and obligations
 18 under the same license agreement.” *Id.*

19 The substantial similarity requirement is more than satisfied here because
 20 Ortmann’s claims are substantially similar to claims alleged in the *Opyrchal*
 21 Action.

22 4. Applying The “First-to-File” Rule Will Promote Judicial 23 Economy.

24 The policy promoted by the first-to-file rule is compelling here. First, the
 25 prosecution of separate actions, including separate class certification determinations
 26 and, if appropriate, class trials in each action, would result in the duplication of time
 27 and effort by both the parties and the court. Clearly, judicial efficiency will not be
 28 promoted, and inconsistent rulings could result by allowing each action to proceed

1 on a class basis. Second, similar facts, documents and testimony will determine be
2 involved in both actions proceeding as putative class actions. For example, the
3 documents, discovery responses and testimony which could be used in the
4 *Opyrchal* Action as to the class certification issue will also be relevant in the
5 *Ortmann* Action.

6 Third, a stay or a transfer of this action will not in any way prejudice
7 Ortmann or deprive her or those she seeks to represent of their day in court. On the
8 other hand, if this case is not stayed or transferred, Defendants will be forced to
9 incur the wasteful expense and time demands associated with litigating virtually
10 identical issues and claims twice, in two separate forums. Thus, Defendants clearly
11 will be prejudiced.

12 Finally, allowing the two putative class actions with identical class members
13 and overlapping issues to proceed simultaneously would be detrimental even to the
14 plaintiffs in that it would increase attorneys' fees, thus reducing any potential
15 recovery. Moreover, if any classes are certified, the two sets of notices, and other
16 duplicative procedures, could easily confuse class members.

17 In sum, it makes no sense for more than one court to examine the issues
18 raised by these two cases. Sound judicial administration requires either a stay of
19 the *Ortmann* Action in favor of allowing the first-filed *Opyrchal* Action to proceed
20 or a transfer of the *Ortmann* Action to the Central District. In the alternative, the
21 First, Second, Third, Fourth, Sixth, and Seventh through Twelfth causes of action in
22 the *Ortmann* Action should be dismissed in favor of the duplicative claims in the
23 first-filed *Opyrchal* Action.

24 A waste of both judicial and the parties' resources would result if these cases
25 were maintained in separate courts when the cases involve the same parties, claims,
26 evidence, damages, and classes. *See e.g., Pacesetter Systems, Inc. v. Medtronic,*
27 *Inc.*, 678 F.2d 93, 96 (1982) (dismissing second filed action finding that "the goal
28 of judicial efficiency would not be served by accepting jurisdiction"); *Curtis v.*

1 *Dimaio*, 46 F. Supp. 2d 206, 215 (E.D. N.Y., 1999) (“It is well established that
 2 federal district courts possess the power to administer their dockets in a manner that
 3 conserves scarce judicial resources and promotes the efficient and comprehensive
 4 disposition of cases.”) citing *Colorado River Water Conservation Dist. v. United*
 5 *States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

6 IV. CONCLUSION

7 Defendants request that the Court either stay the *Ortmann* Action or transfer
 8 it to the Central District where the first-filed *Opyrchal* Action is pending. A stay of
 9 duplicative, overlapping causes of action is the correct result when the matters
 10 brought to issue are already at issue in prior litigation, as they are here. It is
 11 universally recognized that a “litigant has no right to maintain a second action
 12 duplicative of another.”¹¹ Alternatively, Defendants request that the Court dismiss
 13 the first, second, fourth and sixth through twelfth causes of action in this matter in
 14 favor of the identical claims at issue in the *Opyrchal* action.

15
 16 Dated: May 24, 2007

MORGAN, LEWIS & BOCKIUS LLP

17
 18 By /s/ JILL A. PORCARO

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 and New York Life Insurance and
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 22
 23 ¹¹ See *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1145 (E.D. Cal. 1999). See also *WeWee v. United*
 24 *States*, 2002 U.S. Dist. LEXIS 2959 (Dist. Az. 2002) (Second class action dismissed asserting
 25 same underlying basic claims regarding alleged improper disclosure of tax information with
 26 insignificant differences in the pleadings as being duplicative under the first-to-file rule) and
 27 *Walker v. Progressive Casualty Insurance Company*, 2003 U.S. Dist. LEXIS 7871 (Court
 28 dismissed under the first-to-file rule an attempt by the plaintiffs to file a class action duplicative
 of one brought earlier by different named plaintiffs asserting the same failure to pay overtime
 claims. The plaintiffs’ earlier attempt to file a duplicative case had also been dismissed for the
 same reasons.).